

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROBERT ANTHONY MCNEIL,

Defendant-Appellee.

UNPUBLISHED

October 4, 2007

No. 273012

Wayne Circuit Court

LC No. 03-008756-01

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Plaintiff appeals the sentence of 10 to 22 months in prison imposed on defendant's plea-based conviction of criminal sexual conduct in the first degree (CSC I), the victim being under 13 years of age, MCL 750.520b(1)(a). We vacate defendant's sentence and remand for resentencing before a different judge. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to one count of CSC I. The statutory sentencing guidelines recommended a minimum term range of 27 to 45 months. The trial court sentenced defendant to serve a term of five years' probation, with the first year in jail. In *People v McNeil*, unpublished per curiam opinion of the Court of Appeals, issued August 9, 2005 (Docket No. 253394), another panel of this Court vacated defendant's sentence and remanded for resentencing, observing that MCL 771.1(1) prohibited the imposition of a sentence of probation for a defendant convicted of CSC I. *Id* at 1. This Court remanded the case with instructions that the trial court sentence defendant "in accordance with MCL 771.1(1) and the sentencing guidelines." *Id.* at 1-2.

On remand, the trial court noted that defendant was attending school, had completed sex offender counseling and registered as a sex offender, had tested negative for drugs and alcohol, and had reported to the probation department as required. The trial court found that these facts constituted substantial and compelling reasons to deviate downward from the sentencing guidelines, and sentenced defendant to 10 to 22 months in prison, with credit for 298 days.

This Court denied plaintiff's delayed application for leave to appeal for lack of merit. Our Supreme Court, in lieu of granting plaintiff's application for leave to appeal, remanded the case for consideration as on leave granted.

As a general rule, a trial court must impose a sentence within the guidelines unless the trial court articulates substantial and compelling reasons for departing from the guidelines. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence. *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003). To be objective and verifiable, the factors must be actions or occurrences that are external to the mind, and that are capable of being confirmed. *Abramski, supra*. The reason for the departure must be articulated by the trial court on the record, MCL 769.34(3), and must justify the particular departure at issue. *Babcock, supra* at 257-261.

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines. In addition, in departing from the guidelines, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the offender. *Babcock, supra* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The determination of the existence of a factor for departing from the guidelines is reviewed for clear error, the determination that a factor is objective and verifiable is reviewed de novo, and the determination that objective and verifiable factors merited departure from the guidelines is reviewed for an abuse of discretion. *Babcock, supra* at 264-265. A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender characteristic that was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight. *Id.* at 267-268. An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Id.* at 269. In determining whether substantial and compelling reasons existed to merit departure from the sentencing guidelines, an appellate court must give appropriate deference to the trial court's sentencing determination. *Id.* at 270.

Plaintiff argues that the trial court abused its discretion by concluding that the factors cited, i.e., that defendant had complied with the terms of his probation, constituted substantial and compelling reasons for departing downward from the guidelines. We agree.

We vacate defendant's sentence of 10 to 22 months, and remand this matter for resentencing before a different judge. A minimum term that falls within the guidelines is presumed to be proportionate. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). Here, the sentencing guidelines recommended a minimum term range of 27 to 45 months; defendant's maximum sentence fell below the low end of the guidelines range. The reasons cited by the trial court for departing downward from the guidelines, i.e., that defendant was attending school, had completed sex offender counseling and registered as a sex offender, had negative drug and alcohol screens, and had complied with the terms of his probation, were objective and verifiable. However, we conclude that these reasons did not merit departure from the guidelines. Essentially, the trial court rewarded defendant with a downward departure because defendant did what was expected of him. These reasons should not irresistibly attract the attention of the trial court. *Babcock, supra* at 257-258. To conclude that reasons such as those cited by the trial court justify a downward departure renders nugatory the statutory

requirement that a trial court have substantial and compelling reasons for departing from the guidelines.

Defendant has completed his sentence, and has been discharged from prison. However, a defendant who has been discharged after serving an invalid sentence may be resentenced if the discharge did not result from a commutation, and the time served can be credited against a valid sentence. See *People v Hill (After Remand)*, 202 Mich App 520, 524-525; 509 NW2d 856 (1993). Defendant may be resentenced, with credit granted for all time served. *Id.*

The initial sentence imposed by the trial court, probation and a jail term, involved errors of law. The sentence challenged in the instant appeal involves an abuse of discretion. Under the circumstances, defendant should be resentenced by a different judge. MCL 769.34(11); see also *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Defendant's sentence is vacated, and this matter is remanded for resentencing before a different judge. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Karen M. Fort Hood